RECORD AND BRIEFS

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No. 16-111

IN THE
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.; AND JACK C. PHILLIPS,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION; CHARLIE CRAIG; AND DAVID MULLINS,
Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF AMICI CURIAE MARK REGNERUS, JASON S. CARROLL, JOSEPH PRICE, AND DONALD PAUL SULLINS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether applying Colorado's public accommodation law to compel artists to create expression that violates their sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

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INTEREST OF AMICI CURIAE[1]

Amici Curiae are scholars in the social sciences who have reviewed the studies and research about discrimination and its effects that Respondents' amici cited to the Colorado Court of Appeals. Amici have found that research deficient and the claims based on it unsupported. Amici submit this brief to bring these concerns to the Court's attention. Amici include the following scholars:

- Mark D. Regnerus (Ph.D., Sociology, University of North Carolina), is an Associate Professor of Sociology at the University of Texas at Austin.

- Jason S. Carroll (Ph.D., Family Social Science, University of Minnesota) is a Professor at the School of Family Life at Brigham Young University and a Fellow at the Wheatley Institution.

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[1] Petitioners and Respondent Colorado Civil Rights Commission have filed blanket consents to the filing of amicus briefs. Amici requested and received consent from individual Respondents Charlie Craig and David Mullins. Counsel for a party has not authored the brief in whole or in part; nor has such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. The printing costs for this brief have been paid by the Witherspoon Institute. No one else other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of the brief. One of the listed amici, Dr. Mark Regnerus, receives monetary payment for providing writing, editing, evaluation, and networking services to the Witherspoon Institute, and the interests of the Witherspoon Institute relate to the topic of this brief.

- Joseph Price (Ph.D., Economics, Cornell University) is an Assistant Professor of Economics at Brigham Young University.

- Donald Paul Sullins (Ph.D., Sociology, Catholic University of America) is an Associate Professor in the Department of Sociology at Catholic University of America.

SUMMARY OF THE ARGUMENT

In *Brown v. Entertainment Merchants Association* (2011),[2] this Court reaffirmed that it will not curb personal liberty on an assumption—even a logical probability—that actions implicating the First Amendment will have a deleterious impact on others' health and wellbeing. "The State must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard."[3] More than just showing the existence of an "actual problem," the government must "show a direct causal link between [the acts being regulated] and harm to [be avoided]. . . . [A]mbiguous proof will not suffice."[4]

In its brief filed with the Colorado Court of Appeals, the National Center for Lesbian Rights (NLCR) sought to justify state action in this case by citing various studies suggesting that discrimination

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[2] 564 U.S. 786 (2011).

[3] *Id.* at 799 (citations omitted).

[4] *Id.* at 799-800.

harms the health and wellbeing of members of the LGB community.[5] To pass strict scrutiny, these studies must prove that the actions to be regulated actually cause the harm to be avoided.[6] The studies cited in this case, however, do not support the propositions for which they are cited. *Brown* rejected the studies cited in its case because "[n]early all of the research [was] based on correlation, not evidence of causation, and most of the studies suffer[ed] from significant . . . flaws in methodology."[7] Those same flaws are present here.

Antigay prejudice, including open violence, has been perpetuated throughout history.[8] Outright violence obviously has an ill effect on individuals' health and wellness. But that's not what happened here. In fact, Mr. Phillips did not even discriminate against members of the LGB community. The issue in this case turns on the message Mr. Phillips was being asked to convey, not who was asking him to convey that message. That is, Mr. Phillips did not refuse to conduct business with gay or lesbian customers. On the contrary, Mr. Phillips was willing to fulfill a variety of orders for Mr. Craig and Mr. Mullins. He even volunteered to fulfill other types of orders—but not a custom wedding cake supporting a same-sex

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[5] *See* Brief Amici Curiae of National Center for Lesbian Rights, *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015) (hereinafter "NCLR *Masterpiece* Br.")

[6] *Brown*, 564 U.S. at 799-800.

[7] *Id.* at 800 (quotation marks and citations omitted).

[8] Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 Psychological Bulletin 674, 674-75 (2003).

marriage. Based upon the record, Mr. Phillips presumably would have refused to make a cake celebrating a same-sex marriage even if the individuals purchasing the cake were heterosexuals. Thus, this is not discrimination against a class of persons; it's merely refusal to convey a message. Either way, the studies do not support the conclusion that Mr. Phillips has injured the health or wellbeing of homosexual individuals based upon his refusal to create a wedding cake.

That anti-gay discrimination can diminish psychological and physical health is widely acknowledged.[9] There is not substantial evidence, however, that Mr. Phillips's conscientious objection—targeted only at the narrow concept of Mr. Phillips himself being required to make a wedding cake—fosters anything more than annoyance. This is especially true considering recent changes in societal norms and increasing acceptance of LGB persons. As a result of these changes, LGB persons can seek countless alternatives in the free market without forcing individuals of faith to ignore their consciences.

With rapidly changing societal views, there is simply no evidence that Mr. Phillips's decision to abstain from creating the wedding cake at issue, while otherwise serving LGB individuals, will cause lasting harm to Respondents or the LGB community at large. The studies cited by NLCR's amicus brief have several flaws: (1) they utilize old, outdated data

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[9] Todd G. Morrison, CJ Bishop, Melanie A. Morrison & Kandice Parker-Taneo, *A Psychometric Review of Measures Assessing Discrimination Against Sexual Minorities*, 63 Journal of Homosexuality 1086 (2016).

from a time when societal discrimination was more widespread; (2) they often conflate key concepts such as stigma, discrimination, and even violence; (3) they mistake associations and correlations for causation; (4) they implement unreliable methodologies and ill-defined concepts, on occasion producing results that other researchers have been unable to replicate, and (5) they make logical leaps without analysis (sometimes while ignoring other obvious factors). Precious few studies have really factored out these extraneous issues to determine what type of discrimination really has an impact on the health and wellbeing of members of the LGB community

Simply put, the science does not support the NLCR's conclusions. When the flaws are accounted for, studies demonstrate that members of the LGB community might historically have suffered harm from discrimination outside the close-friends and family circle when the discrimination was widespread and chronic. But with society's recent changes in norms and values and increasing acceptance for LGB persons, there is no evidence that chronic discrimination remains an issue. Studies that account for these issues indicate the members of the LGB community today are more apt to suffer harm when they are discriminated against by friends and family members. In today's society of general acceptance, so-called discriminatory actions by individual members of the general public have little sustained affect. Thus, the social sciences do not create the causal link needed for the State's action to satisfy strict scrutiny.

While public support for same-sex marriage continues to climb, there is no basis to suggest that conscience rights with respect to marriage must be

thwarted.[10] To suggest somehow that accommodating conscience and religious views on marriage opens the door to widespread discriminatory acts against LGB persons is to ignore growing public opinion and the versatility of the American economy to simultaneously accommodate diversity of thought and religious liberty. Consumers have long voted with their feet and wallets, and remain free to do so here.

ARGUMENT

I. Proper analysis does not support claims that a decision of conscience to not help celebrate a same-sex wedding constitutes discrimination that causes "minority stress" and consequent emotional and physical harm.

Everyone agrees that LGB populations historically experienced prejudice more frequently than heterosexual persons.[11] During that period of historical prejudice, LGB groups widely reported poorer emotional and physical health than heterosexual men and women, although there are exceptions and qualifications.[12] NLCR's claim that

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[10] *Gay and Lesbian Rights*, Gallop, http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx (last visited Sept. 4, 2017)

[11] Gregory M. Herek, *Hate Crimes and Stigma-Related Experiences among Sexual Minority Adults in the United States*, 24 Journal of Interpersonal Violence 54 (2009); Sabra L. Katz-Wise and Janet S. Hyde, *Victimization Experiences of Lesbian, Gay, and Bisexual Individuals: A Meta-Analysis*, 49 The Journal of Sex Research 142 (2012).

[12] Lawrence S. Mayer and Paul R. McHugh, *Sexuality and Gender: Findings from the Biological, Psychological, and Social*

Mr. Phillips's decision to not design a cake celebrating a same-sex marriage somehow "causes serious physical, psychological, and social harms to individuals, including LGBT people," is not only an overreach, it's analytically hollow.[13] The event that gave rise to this case is simply not akin to severe behavior such as repeated bullying, interpersonal violence, or the experience of widespread, sustained discriminatory actions. While Respondents no doubt took Mr. Phillips's inaction as an affront, speculations about resulting harm are unfounded, or at the very least overblown. There is simply no scientific literature that proves incidents like this cause the deterioration of a person's psychological or physical health.

II. In the public realm, only widespread, intense discrimination—which is rare in today's increasingly accepting society—has been shown to harm individuals' wellbeing.

Public health researcher Ilan Meyer, whose work is widely cited in studies of LGBT discrimination, notes that "[r]esearchers' preferred explanation for the cause of the higher prevalence of disorders among LGB people is that stigma, prejudice, and

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Sciences, 50 The New Atlantis 10 (2016); Ritch C. Savin-Williams, Kenneth M. Cohen, Kara Joyner, and Gerulf Rieger, *Depressive Symptoms among Same-Sex Oriented Young Men: Importance of Reference Group*, 39 Archives of Sexual Behavior 1213, 1213-15 (2010); Mieke Beth Thomeer, *Sexual Minority Status and Self-Rated Health: The Importance of Socioeconomic Status, Age, and Sex*, 103 American Journal of Public Health 881, 881-88 (2013).

[13] NCLR *Masterpiece* Br. at 7.

discrimination create a stressful social environment that can lead to mental health problems in people who belong to stigmatized minority groups."[14] He applies to their experience what he has dubbed the "minority stress" model, which "describes stress processes, including the experience of prejudice events, expectations of rejection, hiding and concealing, internalized homophobia, and ameliorative coping processes."[15] An implication of the model is that reducing or eliminating all sources of stresses would significantly ameliorate the emotional health challenges experienced by sexual minorities. But the model is more nuanced than at first glance.

In Meyer's analysis, discrimination can cause deleterious health effect for LGB individuals when the discrimination is both repetitive and intense; that is, "external, objective stressful events and conditions (chronic and acute)" are what cause deteriorating health.[16] Yet the stress caused by Mr. Phillips saying that he will not design a custom cake for a same-sex wedding (while simultaneously saying that he will serve them in any other way) is neither "chronic" (occurring consistently across proprietors), nor is it "acute." And this case is certainly not an example of widespread "alienation from social structures, norms, and institutions," as Meyer asserts about Emile Durkheim's study of normlessness as a key cause of suicide.[17] The LGB community is no longer widely

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[14] Meyer, *supra* note 8, at 674-75.

[15] *Id.* at 675.

[16] *Id.* at 676.

[17] *Id. at* 675; Emile Durkheim, *Suicide: A Study in Sociology* (1951).

alienated from American institutions and social structures. Indeed, Respondents are not prevented from entering a civil marriage today, and they have not shown or even attempted to show that they are unable to obtain a custom wedding cake from another source.

The minority-stress perspective actually opposes the idea that LGB persons should be seen merely as victims of social stress. The LGB community—like any other minority group—draws strength from associating with others, tempering the effect of discrimination: "[S]tress and resilience interact in predicting mental disorder. LGB people counteract minority stress by establishing alternative structures and values that enhance their group."[18] In other words, the effect of discriminatory or prejudicial events on health ought not be evaluated as a simple and direct association but rather as one of various factors that have countervailing influences, with societal acceptance and support boosting resilience. The concept of resilience, or rebounding from adversity, has a rich history across the social sciences.[19]

For example, simply documenting that poverty is inversely associated with health (or with educational achievement, etc.) is not especially informative. Nor does it account for why some persons fare better than others when exposed to comparable struggles. In step,

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[18] Meyer, *supra* note 8, at 677.

[19] Ann S. Masten, *Global Perspectives on Resilience in Children and Youth*, 85 Child Development 6, 6-20 (2013); Andrew Zolli and Ann Marie Healy, *Resilience: Why Things Bounce Back* (2012).

the minority-stress model suggests that the effects of discriminatory events can be moderated or exacerbated by a variety of factors that are individualized and subjective: the victim's internalized homophobia, the social support they receive, the centrality and valence of sexual orientation to their personal identity—all matters well beyond the scope of the event itself. In other words, the event in question in this case could have been waved off by the plaintiffs as "Oh well, we realize some people aren't on board with same-sex marriage," knowing other sources would support their efforts. Under the minority-stress model, mediating and moderating factors powerfully affect how events like these are interpreted by those who experience them.

III. The social-science studies regarding the direct effects of stigma and discrimination on the health of sexual minorities is hamstrung by the inability to develop a consensus regarding measurement and overreach in interpreting results.

Minority stress is not a simple model to test. That is, it is difficult to isolate the negative influence of anti-gay discrimination on sexual minorities from experiences of sex-, class-, race-, economic-, political-, religious- and ethnicity-based forms of discrimination. The influence of societal stigma (a relevant social phenomenon but one which applies to a vast number of conditions and varies widely by context) makes it virtually impossible to conclude that Phillips's singular conscience-based decision—to serve gays and lesbians for all requests except for a wedding cake—is akin to sustained, acute

discrimination or violence that would produce a negative effect on the health of sexual minorities.

While many scholars share conceptual ideas about the social reality of gay and lesbian health—including an appreciation for the minority-stress model—social scientists continue to fundamentally disagree about basic measurement and analytic strategies.[20] Studies assessing discrimination against sexual minorities employ few consistent measures. Measures of discrimination vary widely, ranging from the minor ("felt ignored or invisible") to the severe ("felt threatened or harassed"), and include feelings as well as actions.[21] Some studies that purport to explore anti-gay discrimination nevertheless employ measures designed to assess rather different types of experiences, including survey items such as "Family members have pressured me at different times to marry a woman."[22]

The scales that were employed across 162 different studies were found to "possess questionable

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[20] Wilson S. Figueroa and Peggy M. Zoccola, *Sources of Discrimination and their Associations with Health in Sexual Minority Adults*, 63 Journal of Homosexuality 743 (2016).

[21] Kyung-Hee Choi, Jay Paul, George Ayala, Ross Boylan & Steven E. Gregorich, *Experiences of Discrimination and Their Impact on the Mental Health Among African American, Asian and Pacific Islander, and Latino Men Who Have Sex With Men*, 103 Am. J. Pub. Health 868, 868-874 (2013); Vickie M. Mays & Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 19 Am. J. Pub. Health 1869, 1869-76 (2001).

[22] Choi et al., *supra* note 21, at 869.

content validity."[23] In other words, many studies lack consistent objective measures capable of yielding definitive conclusions. In fact, one review of the research concluded that "studies have not been designed in such a way that could allow them to test conclusively the hypothesis that social stress accounts for the high rates of poor mental health outcomes in non-heterosexual populations."[24] To be clear, we are not calling into question the basic association between anti-gay discrimination and subpar psychological health, but rather asserting that the association is a very general one. There is simply no evidence that Mr. Phillips's conscience objection to creating a wedding cake would have any impact on the health of gay individuals or the gay community in general. Indeed, given the numerous factors that contribute to, as well as undermine, health and wellbeing, and the subjective manner in which such factors are processed by individuals or a community, there is virtually no way to formulate a test that would quantify the impact of such a narrow, isolated event like the one under consideration here.

Social scientists not only disagree about what constitutes discrimination and how to measure it, they also vary widely on the meaning and proper measurement of stigma. Stigma, Meyer holds, concerns the *expectation* of rejection and discrimination, not the *experience itself*. Nevertheless, stigma and discrimination tend to be conflated in Meyer's "minority stress" theory, each becoming

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[23] Morrison et al., *supra* note 9, at 1086.

[24] Mayer and McHugh, *supra* note 12, at 82.

"stress processes."[25] Sociologist Erving Goffman defined stigma as an "attribute that is deeply discrediting,"[26] while Herek defines stigma as a "cultural belief system."[27] Link and Phelan point out "the variability that exists in the definition of the concept...."

Hatzenbuehler, on the other hand, defines stigma differently, as "the co-occurrence of labeling, stereotyping, separation, status loss, and discrimination in a context in which power is exercised."[28] Thus, for Hatzenbuehler, stigma is enacted, not just anticipated. Hatzenbuehler argues that stigma-related stress "gets under the skin" by creating emotional dysregulation, which, consequently, elevates risk of increased psychopathology in non-heterosexual populations.[29] In other words, there is a pathway by which stigma is believed to produce harm, even though it is seldom a direct or certain effect. However, in a study of "structural" stigma, Hatzenbuehler measured the concept as a simple dichotomous variable (that is, 0 or 1, "yes" or "no") indicating whether study participants lived in a neighborhood in which sampled

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[25] Meyer, *supra* note 8, at 680.

[26] Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 Annual Review of Sociology 363 (2001); Erving Goffman, *Stigma* (1963).

[27] Herek, *supra* note 11, at 57.

[28] Mark L. Hatzenbuehler, Jo C. Phelan & Bruce G. Link, *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 American Journal of Public Health 813, 813 (2013).

[29] Mark L. Hatzenbuehler, *How does sexual minority stigma "Get under the skin"? A psychological mediation framework*, 135 Psychological Bulletin 707, 707 (2009).

respondents answered fewer than two of four questions in what researchers identified as an anti-gay manner.[30] Even an articulate theory like the minority-stress model is unhelpful when accompanied by such poor measurement strategies.

The difficulty in drawing any particular conclusions in this area is compounded by methodological limitations and interpretational overreaches. This is common in sex and sexuality research generally because it is a comparatively new area of study, and a heavily politicized one at that. Those who engage in such studies often seek to support a conclusion in addition to discovering truths. As medical professor John Ioannidis asserted, the relative novelty and popularity of a research subject creates risks for the study's validity. That problem is compounded by the lack of measurable and universally recognized standards, i.e. "flexibility in designs, definitions, outcomes, and analytical modes." Those challenges to validity and reliability will continue to persist until objectively measurable standards eventually converge as a field slowly comes to general agreements on each of these.[31] Given its infancy and attendant lack of standards, this area of

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[30] Mark L. Hatzenbuehler, A. Bellatorre, Y. Lee, B. K. Finch, P. Muennig, & K. Fiscella, *Structural stigma and all-cause mortality in sexual minority populations*, 103 Social Science & Medicine 33, 33-41 (2014).

[31] John P. A. Ioannidis, *Why most published research findings are false*, 2 PLoS Med 1 (2005); *see also* Joseph P. Simmons, Leif D. Nelson, & Uri Simonsohn, *False-positive psychology: Undisclosed flexibility in data collection and analysis allows presenting anything as significant*," 22 Psychological Science 1359, 1359-66 (2011).

research has not yet yielded the "robust body of research" claimed in NCLR's brief. As a result, the NCLR brief describes conclusions with causal language that is simply not supported by the science. Indeed, credible social scientists would not make such expansive, definitive conclusions with cross-sectional, retrospective data. The evidence presented in the NCLR brief is simply not able, with regard to LGB individuals in this era of rising social acceptance, to "show that . . . discrimination causes serious harms even when a person can obtain services elsewhere."[32] Studies to support such a conclusion have not yet been conducted.

IV. NCLR's studies mistakenly conflate association and causation.

The studies that NCLR cites fail to isolate discrimination based upon sexual orientation from other forms of discrimination. Under *Brown*, "[t]he State must specifically identify an 'actual problem' in need of solving, . . . and the curtailment of free speech must be actually necessary to the solution."[33] More than just showing a correlation, the government must "show a direct causal link between [the acts being regulated] and harm to [be avoided]. . . . [A]mbiguous proof will not suffice."[34]

Seeking to bridge that chasm, NCLR makes the sweeping claim that "[p]rejudice-related stressful life events have a unique deleterious impact on health that persists above and beyond the effect of stressful

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[32] NCLR *Masterpiece* Br. at 10.

[33] 564 U.S. at 799 (citations omitted).

[34] *Id.* at 799-800.

life events unrelated to prejudice."[35] In support of this, NCLR cites a lone article published in the *Journal of Behavioral Medicine* in 2015, but the article supports no such conclusion. Only seven percent of the study's sample of New Yorkers reported an incident of any type of prejudice in a year's time.[36] That is, just 26 prejudice events (among 370 participants) were recorded across the entire sample, encompassing "prejudice related to the participant's sexual orientation, gender, gender non-conformity, race, ethnicity, age, religion, disability, physical appearance, and/or socio-economic status." Its analyses revealed that the odds of experiencing a physical health problem between study waves were three times higher among sexual minorities who experienced a prejudice event compared with those who did not. Unfortunately, the article cannot tell us whether the prejudice event had anything to do with their sexual orientation because the study did not distinguish between prejudice on that basis or on any other basis. Instead, the study's authors take an "intersectionality" approach to interpreting the results, rather than discerning between types and sources of discrimination. Moreover, the events were only influential if an external rater defined both the prejudicial events and the health of the participant. When the participants themselves assessed both their experience of discrimination and their own health, no associations were evident. Thus, NCLR's lone citation cannot bear the weight of their sweeping claim.

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[35] NCLR *Masterpiece* Br. at 8.

[36] David M. Frost, Keren Lehavot, & Ilan H. Meyer, *Minority Stress and Physical Health Among Sexual Minority Individuals*, 38 Journal of Behavioral Medicine 1, 1 (2015).

This highlights the difference between studying the experiences of general discrimination reported by sexual minorities and that of experiences of discrimination based on sexual orientation *specifically*. In a study utilizing excellent measures of discrimination and a large national probability sample of LGB-identified adults, LGB respondents who reported any form of discrimination were indeed more likely to have engaged in substance abuse in the past year. But this correlation did not mean that the discrimination caused the substance abuse disorder. On the contrary, "[o]ne unexpected result was that there was no statistically significant relationship between substance-use disorders and sexual orientation discrimination alone in the final regression models."[37] There was a statistically significant relationship, however, associated with substance use disorders when combined with experiences of racial/ethnic or gender discrimination. The same was found to be the case in a second evaluation of that data, which concluded that discrimination based on sexual orientation alone was not associated with greater odds of reporting a mental health disorder.[38]

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[37] Sean Esteban McCabe, Wendy B. Bostwick, Tonda L. Hughes, Brady T. West, & Carol J. Boyd, *The Relationship between Discrimination and Substance Use Disorders among Lesbians, Gay, and Bisexual Adults in the United States*, 100 American Journal of Public Health 1946, 1946-50 (2010).

[38] Wendy B. Bostwick, Carol J. Boyd, Tonda L. Hughes, & Brady West, *Discrimination and Mental Health among Lesbian, Gay, and Bisexual Adults in the United States*, *American* 84 Journal of Orthopsychiatry 35, 35-45 (2014).

These results are entirely consistent with minority stress theory, discussed above. As Meyer asserts, "minority stressors for a gay man who is poor would undoubtedly be related to his poverty," not just his sexual orientation.[39] In short, far too many researchers unfortunately conflate all sources of discrimination when the sample involves a sexual minority, attributing every form of discrimination to the person's sexual self-identity.[40] Such studies, therefore, would only be helpful if this Court were addressing individuals who face discrimination for being both gay and a racial minority or gay and poor. The case confronting the Court, however, concerns only an instance of alleged sexual orientation discrimination. As to that single source, the studies simply do not support the NCLR's conclusions.

V. The studies identify correlations without collecting sufficient temporal data to determine whether there is a cause/effect relationship.

Similar methodological deficiencies exist in Mays & Cochran's dated study of 73 gay and lesbian Americans, cited in Lambda Legal's amicus brief filed with the Colorado Court of Appeals in this case and cited elsewhere.[41] No causation analysis is possible

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[39] Meyer, *supra* note 8, at 678.

[40] Frost et al., *supra* note 36.

[41] Br. Amici Curiae of Lambda Legal Defense and Education Fund, Inc. et al., *Craig v. Masterpiece Cakeshop, Inc.*, (Colo. Ct. App. 2015); Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. Cal. L. Rev. 619, 645 n.127 (2015).

because the study is simply a retrospective query about experiences. Moreover, only a minority among the study's respondents—often a tiny one—reported ever experiencing each of the different types of discrimination that the study asked about (e.g., not given a promotion, fired, denied medical care).[42] In some cases, no lifetime experiences were recorded, including being forced from your neighborhood, denied a bank loan, or prevented from renting or buying a home.

Showing the weakness of the data cited by Respondents' amici below, some of their studies lean on samples that are unrelated to this case. For example, Bockting et al.'s (2013) study of stigma and mental health concerns transgender Americans—a population that is not at issue here. Worse, it relies entirely on a recruited convenience sample generated from transgender community websites, forums, and online lists, taking care to include equal numbers of "transsexual, cross dresser, drag queen or king" participants. Not only is this study—cited in the NCLR brief below—unscientific, but it is cross-sectional, meaning it cannot identify a causal order. It can only describe the characteristics of a self-selected sample. That study is simply unable to determine whether stigma and/or discrimination contributes to a share of that sample's poorer mental health.

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[42] Mays & Cochran, *supra* note 21.

VI. Key studies appear to reach results that cannot be replicated or confirmed.

The inability to replicate study results—even when the same conditions are applied—is another reason to doubt the claims based on this relatively novel area of research. The Hatzenbuehler study of structural stigma revealed dramatically shorter life expectancy—approximately 12 years—for sexual minorities who resided in communities purported to exhibit high levels of anti-gay prejudice. Repeated attempts to replicate the study, however, failed to generate the original study's key finding. Each of the subsequent attempts were unable to yield a model in which structural anti-gay stigma had a statistically significant impact on the mortality of sexual minorities.[43] Ironically, both the Hatzenbuehler study and the study documenting its inability to be replicated are published in the same academic journal—even though both cannot be correct. This reinforces impressions of disarray in this new and politicized field of research.

These clearly disparate results demonstrate that there is no consensus here yet. Moreover, conflation of key terms has been a consistent theme in this area of study. For example, the American Psychological Association (APA) groups distinct terms together—concepts as disparate as social stigma (which is largely subjective and may not have even been intended) with that of outright violence (which is

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[43] Mark Regnerus, *Is Structural Stigma's Effect on the Mortality of Sexual Minorities Robust? A Failure to Replicate the Results of a Published Study*, 188 Social Science & Medicine 157, 157-65 (2017).

intentional and objectively criminal): "[T]he social stigma, prejudice, discrimination, and violence associated with not having a heterosexual sexual orientation and the hostile and stressful social environments created thereby adversely affect the psychological, physical, social and economic well-being of lesbian, gay, and bisexual individuals."[44] The CDC also conflates distinct concepts,[45] collectively describing homophobia, stigma, and discrimination as "negative beliefs and actions." Studies that lump criminal violence into the same category as unintended stigma are simply inadequate to measure what effects (if any) Jack Phillips's faith-based decision to not create a wedding cake has on the LGB population.

VII. Politics have crowded out sound scientific methodology.

Even when the research sufficiently focuses on discrimination based on a person's sexual orientation, there seems to be a disinterest in understanding how discrimination actually works (despite the availability of the minority-stress model). In other words, the rush to document poorer LGB health is often accompanied by a lack of scholarly interest in understanding the pathways by which health

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[44] *Sexual Orientation & Marriage*, American Psychological Association (2004) (reaffirmed 2010), http://www.apa.org/about/policy/marriage.aspx.

[45] *Gay and Bisexual Men's Health: Stigma and Discrimination*, Centers for Disease and Prevention, https://www.cdc.gov/msmhealth/stigma-and-discrimination.htm (last visited Sept. 4, 2017).

differentials arise, save for blaming all stress and poorer outcomes on discrimination. For example, the NLCR brief filed below notes higher rates of asthma and allergies in samples of gay, lesbian, and bisexual persons. The increased association between asthma and the LGB community is undisputed—it has been noted across different samples and multiple studies. Nevertheless, the NLCR brief assumes what it cannot prove—that the disparity in asthmatic incidents must be due to "[t]he stress caused by discrimination based on a person's sexual orientation or gender identity."[46] The NLCR's conclusion, however, is entirely unsustainable because the studies cited did not measure experiences of discrimination.

The universally recognized epidemiologic explanation for the higher rate of asthma is differential rates of smoking. And members of the LGB community smoke more often than the general population. In fact, the studies cited in the NLCR's brief recognized this fact: "Smoking is unambiguously linked to asthma, some cancers, and cardiovascular disease, all of which are more prevalent in LGB relative to heterosexual samples".[47] Despite this obvious and logical cause of increased asthma, the NLCR brief never mentions the correlation. Ignoring the logical (and documentable) explanation, NLCR argued instead that the science supported their untested proposition that the asthma was caused by discrimination. This is not how the interpretation of

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[46] NCLR *Masterpiece* Br. at 8.

[47] David J. Lick et al., *Minority Stress and Physical Health Among Sexual Minorities*, 8 Perspectives on Psychological Science 521, 535 (2013).

social science ought to proceed. Theories are to be tested by empirical measures and interpreted judiciously in order to understand how social processes work. Assumptions about causation need to be tested and substantiated, not merely asserted.

VIII. Some of the studies cited by NCLR employ opt-in samples, rather than random samples, making them scientifically unreliable.

Many studies are problematic for the additional reason that they employ nonrandom surveys. A variety of studies discussed here are based on "snowball" samples, meaning whoever fits the description and would like to participate voluntarily may opt in. That is not how research on populations ought to be conducted. It is not that there is no value in such studies, but they are exploratory rather than confirmatory, meant to suggest (but not confirm) possible processes that may be at work in broader populations, not just found in a population of individuals who may be motivated to participate because of their feelings about an issue or their experience of having suffered discrimination.

Equally problematic, some of the studies are simply not relevant. The NCLR notes a conceptual link between discrimination and "residual mental health problems," such as "sleep disturbances and nightmares, headaches, diarrhea, uncontrollable crying, agitation and restlessness, increased use of drugs, and deterioration in personal relationship."[48]

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[48] NCLR *Masterpiece* Br. at 10; *see also* Linda Garnets et al., *Violence and Victimization of Lesbians and Gay Men: Mental*

But the original reference for this claim—which itself refers to a pair of studies published over 30 years ago—is to the victims of crimes, not the victims of discriminatory events. And again, the studies did not distinguish between sexual-orientation discrimination and other forms of discrimination, so they are unable to establish a causal link between sexual orientation and residual health problems for members of the LGB community.

IX. With society's recent shift toward greater inclusion and acceptance of LGB persons, remaining discrimination by members of the general public has little discernible impact on the health and wellbeing of LGB persons.

The age of the studies that the NCLR cites is important, given the rapid shift in attitudes toward the LGBT population and same-sex marriage. Social science seeks to understand the social world as it is. And of course, this Court needs to understand current social norms when making decisions that will affect the future, not the past. Citing studies conducted more than 10 years ago makes little sense when attempting to understand the role of anti-gay discrimination and health in America today. The authors of one recent (2016) study noted:

> The majority of the work examining the effects of sexual minority discrimination was published in the early 2000s, with data collected in the mid- to late 1990s.... Given the current trend toward equality,

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Health Consequences, 5 Journal of Interpersonal Violence 366, 367 (1990).

> it is plausible that sexual minorities are not experiencing or reporting as much discrimination as they once were.[49]

This conclusion emerged from a survey of 277 LGB adults which took an unusually nuanced approach toward assessing discrimination. The survey not only addressed the direct and indirect effects of discrimination, it also differentiated between the sources of discrimination—that from family or friends, and that from "others." The study concludes that the source of discrimination matters:

> [W]hen both sources of discrimination were examined together, only discrimination from family and friends continued to significantly predict greater psychological distress, physical symptoms, and poorer subjective physical health.50

Once discrimination by family and friends was accounted for, there was no independent effect on physical and emotional health that was attributable to discrimination by "others." Indeed, discrimination by others was not even significantly associated with perceived stress reactivity, a key indirect pathway by which discrimination is believed to be associated with downstream health challenges.

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[49] Figueroa & Zoccola, *supra* note 20, at 758.

[50] *Id.* at 755.

Moreover, it is notable that with the recent societal shifts and increased inclusion, the frequency of discrimination by "others" was uncommon. The average person had experienced discrimination by others, but such incidents occur less often than "once in a while." Such infrequent exposure to discrimination does not constitute "excess" and "chronic stress" under the minority-stress model.[51] In short, times have changed. Suggestions that Mr. Phillips's actions are common, or could reverse gains in LGB acceptance, strain the imagination.

CONCLUSION

Brown concluded that California had failed to satisfy the strict scrutiny test by citing studies that demonstrated mere correlations, not causation. The same is true here. We presently have no evidence that someone like Jack Phillips, who declines to help celebrate a same-sex wedding, while otherwise serving LGB individuals, unequivocally causes lasting emotional harm and physical toll on anyone.

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[51] Meyer, *supra* note 8, at 690.

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